SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO INC., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

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BRIEF IN OPPOSITION FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION

BASIC QUESTION PRESENTED

Is a conventional transportation for hire arrangement converted into:

(1) a sale by the owner-shipper to the pipeline-transporter; and,

(2) a resale by the pipeline-transporter to the owner-shipper

solely by reason of the commingling of the transportation gas in the pipeline with other interstate gas owned and sold by the pipeline?

PARTIAL RESTATEMENT

The Commission, after oral argument held October 20, 1964, took jurisdiction over the arrangement between Transco[1] and Texaco[1] as a conventional transportation arrangement and issued a certificate to Transco covering the transportation. The Commission, fully aware of the commingling of the Texaco gas in Transco's line, in a unanimous opinion declined to treat the delivery of gas by the shipper, Texaco, to the transporter, Transco, as a sale. Instead, it treated such delivery by Texaco as being "governed by historic notions of bailments." (R. 2037). The court below also recognized the fact of the commingling of the transportation gas with other gas in Transco's pipeline, some of which is resold. It, in turn, unanimously refused to accept Petitioner's contention that the commingling or molecular theory enunciated in the *Lo-Vaca*[2] and *Amerada*[3] cases required the Commission to treat the delivery of gas by Texaco to Transco as a sale. It held such delivery to be part of a bailment and the arrangement between Texaco and Transco properly to be governed by historical law of bailments as had the Commission.

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[1] "Transco" is used to designate respondent, Transcontinental Gas Pipe Line Corporation and "Texaco" is used to designate respondent, Texaco Inc.

[2] *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965).

[3] *F.P.C.* v. *Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

REASONS FOR DENYING THE WRIT

A. The Commingling or Molecular Doctrine of Lo-Vaca and Amerada Is Irrelevant to Any Issue in the Instant Case Since There Was No Sale of Gas by Texaco to Transco for Resale or Otherwise

In the *Lo-Vaca* and *Amerada* cases relied upon by Petitioner, there were clear, conceded and unquestionable sales of gas by producers to pipeline companies. The gas so purchased by the pipelines was commingled in interstate pipelines by the pipelines with other interstate gas which was destined for resale by the pipelines. The narrow question in both *Lo-Vaca* and *Amerada* was whether the *sales* by the producers were sales for resale in interstate commerce. This Court held that by reason of such commingling, certain molecules or portions of the commingled gas were as a matter of physical fact resold by the pipelines to their interstate resale customers and consequently the sales by the producers were sales in interstate commerce for resale.

In the instant case there was no sale whatsoever by Texaco to Transco. The transaction between the two companies was a conventional transportation arrangement within the contemplation and purview of the Natural Gas Act and the legal relationship between the parties was that of bailor (Texaco) and bailee-for-hire (Transco).[4]

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[4] The legal relationship is substantially identical with that existing in the crude oil pipeline industry between the shipper and the oil pipeline carrier. In that industry, it is the frequent practice for crude oil to be commingled in the pipeline with that of other shippers and on occasion with that of the pipeline owner, provided that the various crude oils in the stream are of substantially equal quality. Tariffs of the crude oil pipeline companies, on file with the

Petitioner, by its attempted contortion of every shipper of gas, in a commingled pipe-line stream with gas for sale, into a seller of gas and every pipeline carrier of such gas into a purchaser of gas, would virtually write out of the Natural Gas Act any concept of transportation for hire. But, in its attempt it is at odds with this Court's reading of the Natural Gas Act. In the recent *United Gas* case,[5] Justice White, speaking for a unanimous Court, stated at page 89:

> "The Act gives the Commission jurisdiction over interstate transportation of natural gas as a separate and distinct matter, *whether the transportation is for hire* or for sale and whether the sale is for consumption or resale. FPC v. East Ohio Gas Co., 338 U.S. 464; FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1; Panhandle Eastern Pipe Line Co. v. FPC, 359 F.2d 675."[6]

Interstate Commerce Commission, contain provisions of which the following, taken from ICC Tariff No. 136 of Arapahoe Pipeline Company, are typical in import:

> "6. *Quality of Crude Petroleum Received.* No crude petroleum will be received for transportation as part of a 'common stream' except good merchantable crude petroleum of acceptable character readily susceptible of transportation through carrier's existing facilities, and will not materially affect the quality of the crude petroleum.
>
> * * * * *
>
> "8. *Quality of Crude Petroleum Delivered.* Carrier shall be under no obligation to make delivery of the identical crude petroleum which it may receive, but all such crude petroleum received for transportation may be delivered out of the 'common stream' of carrier."

At the time of the enactment of the Natural Gas Act in 1938, Congress was, undoubtedly, aware of the practices and legal relationships in the oil pipeline industry, since it had enacted legislation for the regulation of the oil pipelines in 1906 under the Hepburn Act, 49 U.S.C. § 1, 34 Stat. 584; June 29, 1906, Ch. 3591.

[5] *United Gas Pipe Line Company* v. *F.P.C.*, 385 U.S. 83 (1966).

[6] Throughout this brief emphasis in quoted material is supplied.

This pronouncement of the Court is buttressed by the background of the Act as evidenced by the Federal Trade Commission Report cited in Section 1(a) of the Act and by the repeated interpretation of the Act by the Commission in its certification of transactions which were transportations for hire. The Final Report of the Trade Commission study[7] contains an enormously detailed commentary on all aspects of the natural gas pipeline industry, as it then existed, with the following relevant statements on the nature and kind of activities performed:

> "There were . . . examined during the investigation the books and records of 24 companies whose business consisted solely of transmitting natural gas from the production field to the markets, at which latter points the gas was either sold at wholesale *or was delivered for a transportation charge.*"[8]

In another place, where the Trade Commission reported on the income of the natural gas transmission companies, the Final Report had this observation:

> "The income of natural gas pipeline or transmission companies was generally derived from sales of natural gas, although some transmission companies derived their principal income from transporting natural gas for other companies for fees. . . . A few of those transmission companies which were generally engaged in buying and selling natural gas also derived a minor portion of their income *from transporting gas for others for a fee.*"[9]

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[7] Senate Doc. 92, Part 84-A, 70th Cong., 1st Sess.

[8] *Ibid,* at page 358.

[9] *Ibid.*, at page 453.

At the foot of the Final Report, in stating its ultimate recommendation, the Trade Commission study said that, among other remedial legislation:

> "A Federal regulatory law should be enacted applicable to interstate natural gas pipe lines which transport gas for ultimate sale to and use by the public, regulating contracts for purchase of gas to be transported interstate, *or regulating rates for carriage* or city gate rates at the end of such transportation, or all of these." [10]

Also, in the detailed description of the operations of the transmission companies studied by the Trade Commission, it is evident that *both* the sale and transport services were carried on by the same enterprise.[11] And, it is obvious in the foregoing that the Trade Commission was discussing commingled transport and sale activities by the same pipeline.

Nothing in the legislative history of the Natural Gas Act dilutes or changes any of the foregoing observations or comments of the Trade Commission concerning the activities of pipeline companies. In the decision of the Commission here for review, it said (R. 2035):

> "Considering the fact that the pipeline industry had evolved to a considerable extent by the time Congress enacted the Gas Act, it is noteworthy that the term 'transportation' was specifically included."

Thus, the Commission was aware, in deciding the instant case of the historical context of the transportation concept, as it was incorporated into the Act.

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[10] *Ibid.*, at pages 616-17. Citations omitted.

[11] *Ibid.*, at page 453.

Judicial interpretation of the Act, at the highest level, confirms the conclusion that the "transportation" activity is a separate and special area of the Commission's jurisdiction. In *Panhandle Eastern Pipeline Co.* v. *Public Service Commission,* 332 U.S. 507, 516 (1947), the Court, in describing the breadth of Federal jurisdiction under the Natural Gas Act, as expressed in Section 1(b), said:

> ". . . Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale."

Again, in *F.P.C.* v. *East Ohio Gas Company,* 338 U.S. 464, 468 (1950), after first making clear that the term "transportation" in Section 1(b) of the Gas Act included transportation for hire as well as transportation preceding sales for resale, the Court said, with even greater precision, that:

> ". . . [Section] 1(b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act."

This contrast between transportation "or" sale—this "disjunctive phrasing" as it was styled by the Supreme Court in the *East Ohio* case, *supra* (338 U.S. at 468)—is carried also into the important rate regu-

lation provisions of Sections 4(a), 4(b), 4(c) and 5(a)[12] of the Gas Act. Section 4(a), for example, provides that:

> "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation *or* sale of natural gas . . . shall be just and reasonable . . ."

A rate made or demanded for transportation can exist only in the context of the type of service proposed here, that is, a rate for the carriage of gas.

The other rate regulating provisions referred to, maintain the same sharp distinction between rates for transportation *or* sale.

The Federal Power Commission has conventionally, continually, and often routinely, granted certificates permitting transportation arrangements similar to the Transco-Texaco contract. *Trans-Continental Gas Pipe Line Company, Inc.*, 7 FPC 24, 13 FPC 1006, 14 FPC 333, 22 FPC 836; *Houston Texas Gas & Oil Corp.*, 16 FPC 118; *aff'd sub nom. Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1957); *cert. denied*, 356 U.S. 959 (1958); *Texas Gas Transmission Corporation*, 29 FPC 140; *Texas Gas Transmission Corporation*, 30 FPC 689;[13] *Chandeleur Pipe Line*

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[12] 15 U.S.C. §§ 717c and 717d.

[13] The transportation service authorized in the cited case is also rendered for Texaco, for the carriage of its gas in a stream commingled with resale gas from Louisiana production points to its Lawrenceville, Illinois refinery. The transportation agreement between Texas Gas Transmission and Texaco was executed *after* the contract involved in this case, and routinely approved by the Commission, without a formal hearing, because none of Texas Gas' customers objected to the proposal.

Company, 30 FPC 1515; *Sabine Pipe Line Company,* 31 FPC 696. In some of these cases, the transportation volumes are carried commingled with the gas supply for the resale services; in other cases, the pipeline performs only the transportation service for a single customer. These are barely a recent few of the reported cases. As the Commission noted in its Opinion below (R. 2035):

> "In the past, the Commission has approved several transportation arrangements of a type similar to that presented here. At the present time, there are 25 transportation rate schedules on file with the Commission by 13 different pipelines."

The court below held that "The arrangement between Texaco and Transcon would involve nothing more than the bailment of a fungible commodity" and in this connection pointed out, as the Commission had found (R. 2036), that no transfer of title was intended by the parties (371 F. 2d 4 [1, 2]). Petitioner, nevertheless, persists (Pet. p. 13) in contending that there was a transfer of title by Texaco for the asserted reasons that: "(1) Article 12 of the contract between Transco and Texaco provided that Transco would assume the risk of loss while the gas was in its possession, and (2) Article 10 of the General Terms and Conditions applicable to all of Transco's filed F.P.C. Rate Schedules set forth in its Gas Tariff provides that:

> 'Seller agrees that it will and it hereby does warrant for itself, its successors and assigns, that at the time of delivery it will have good title to all natural gas delivered by it to Buyer, free and clear of all liens, encumbrances and claims whatsoever, * * *' "

Petitioner's "assumption of risk" argument as evidence of title in Transco was considered and conclusively disposed of by the court below (371 F. 2d at p. 4).

Petitioner's other title argument, based upon the provision of Transco's Tariff, is erroneous. The provision of Transco's Tariff cited by Petitioner is applicable only to its sales rate schedules; it has no application to the transportation rate schedule which is involved in the instant case.[14] The sales of gas which are made by Transco come out of that portion of the commingled gas in its pipeline which is exclusive of that portion of gas which is required to be apportioned to the transportation arrangement with Texaco. Under the Commission's Regulations Under the Natural Gas Act (§ 260.7), Transco is required to furnish to the Commission an exhaustive statement (Form 15) of its gas supply which is required to support Transco's sales to its customers. No part of the gas, which is the subject of the Texaco transportation, is included in Form 15 or in the reserves dedicated to Transco's sales contracts. Therefore, Transco does have title and warrants title only to the gas delivered to its gas *buyers.*

An analogy is found in the grain warehouse cases. In that field, grain of others is commonly commingled in a fungible mass with that of the warehouse owner. Each of the persons retains title to his proportionate share of the commingled mass. The same is true in respect to the ownership of the "common stream" in the oil pipeline cases.

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[14] The transportation agreement between Texaco and Transco (R. 1179-1209) is itself the rate schedule filed with the Commission, as part of Transco's Tariff, Volume No. 2. An entirely separate Volume No. 1 contains the sales rate schedules as well as the General Terms and Conditions relied upon by Petitioner.

B. The Transportation Arrangement Between Texaco and Transco Leaves No Regulatory Gap

Petitioner contends that the Commission should have treated the delivery of gas by Texaco to Transco as a sale and that such a holding is necessary in order to avoid a "regulatory gap" (Pet. p. 14).

At the outset it is to be emphasized in any discussion of "regulatory gap" that the transportation arrangement between Texaco and Transco was *not* contrived by the parties thereto for the purpose of avoiding Commission regulation as the lower court observed was the case in *Lo-Vaca*.[15] It is this critical distinction which made the *Lo-Vaca* case important and which makes the instant case not of broad importance in the administration of the Natural Gas Act.

Treating the delivery of gas by Texaco to Transco as a sale and a consequent sale back to Texaco by Transco at Texaco's refinery, as urged by Petitioner, would be creating an utterly fictional series of sales with no attendant benefits to Transco's customers or the ultimate consumer. The "sale" back to Texaco at the refinery would become a non-jurisdictional "direct" sale, and the rate for such direct sale admittedly would be beyond the power of the Commission to control (R. 2038). In any rate proceeding of Transco, the Commission would allocate to this direct sale only the properly attributable system costs. The balance of the revenues to be derived from the service above

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[15] "The parties [in Lo-Vaca] attempted by the contracts to evade Commission jurisdiction. * * * Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed." 371 F. 2d 1, at p. 5.

the properly allocated costs would not then be credited to Transco's jurisdictional customers as under the proposed conventional transportation arrangement. Thus, the substantial benefits to Transco's system, and consequently to its jurisdictional customers, which the Commission found to exist under the conventional transportation arrangement (R. 2037), would be effectively circumvented under the series of sales rearrangement proposed by Petitioner. It is clear, therefore, that as far as the consumer is concerned, the tortured series of sales suggested by Petitioner in this case would have exactly the opposite result from that accomplished in the *Lo-Vaca* and *Rayne Field*[16] cases.

Furthermore, there is no regulatory necessity to treat the delivery by Texaco to Transco as a sale in order to fill some fictional regulatory gap. If the Commission, on sufficient findings, determined the transportation arrangement to be contrary to the public interest, it could impose lethal regulatory sanction upon Texaco by denying the transportation certificate to Transco as it did in the *X-20* case.[17] The Commission itself emphasized this fact in its Opinion (R. 2037):

> "The Commission has full and complete authority over the transportation agreement, and Texaco could not inject one Mcf of gas into Transco's interstate pipeline unless the Commission is satisfied that the transportation service is required by the public interest."

Having authorized the transportation arrangement, the Commission, of course, has continuing regulatory

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[16] *Public Service Commission* v. *F.P.C.*, 287 F. 2d 143 (D.C. Cir. 1960); *U.G.I.* v. *Continental Oil Company*, 381 U.S. 392 (1965).

[17] *F.P.C.* v. *Transcontinental Gas Pipe Line Corporation*, 365 U.S. 1 (1961).

authority over the transportation rate, thus enabling it to adjust that rate to properly harmonize with Transco's other jurisdictional rates.

At various places on pages 9 and 25-28 of the petition, Petitioner adverts to the recent opinion (No. 516) of the Commission in *Florida Gas Transmission Company,* issued March 1, 1967, ... FPC ..., where the Commission, citing the decision of the court below in the instant case, declined to assert direct jurisdiction over a *sale* of natural gas in the field by a producer to an electric generating company, to be transported in interstate commerce by a natural gas pipeline company commingled with the transporter's sale gas. Obviously, the facts in that case differ radically from the facts in the instant case, most importantly because here there is no sale by Texaco to anyone.

Furthermore, in practical effect, the opinion of the Commission in the *Florida* case is *sui generis.* Subsequent to the issuance of the Commission's opinion, the parties proposed a settlement stipulation which reduced the producer's sales prices, which settlement was finally approved by the Commission. However, the Public Service Commission of New York, which had petitioned to intervene after the Commission's decision, while refraining from opposing the settlement, nevertheless put the Commission on notice that in any future case involving a similar type of arrangement it would intervene, and if necessary, litigate the question of Commission jurisdiction over the producer sales. Judicial resolution of the issue in the *Florida* case, expressly reserved in *Lo-Vaca,* should await appropriate occasion and that case should not be treated as the basis for certiorari in the present case.

C. No Error Was Involved in the Presiding Examiner's Taking Official Notice of Material Contained in Another Docket.

Petitioner devotes a full point (D, Pet., p. 19) to its claim that the Examiner erred in utilizing material from another docket (CP64-96) as a part of the basis for his decision and thereby committed prejudicial error in violation of the Administrative Procedure Act.[18] Petitioner's claim is groundless.

Section 7(d) of the Administrative Procedure Act recognizes that official notice may be taken "of a material fact not appearing in the evidence of record," and provides that "any party shall on timely requests be afforded an opportunity to show the contrary." Act of June 11, 1946, c. 324, § 7, 60 Stat. 241.

At the hearing before the Examiner, after references had been made to the application in Docket No. CP64-96, the Examiner stated (R. 654-655), that unless there were objection he would take official notice of the application and asked if there was any objection. The record shows no objection (R. 654-655). In his decision, the Examiner stated (R. 1766):

> "The participants stipulated that the Examiner could take official notice of the then pending application in Docket No. CP64-96."

Public Service took no exception to that statement (R. 1817-1861; see particularly, R. 1837-1845) and thereby waived any objection. Federal Power Commission Rules of Practice and Procedure, Section 1.31(c), 18 C.F.R. 1.31(c); *Wisconsin* v. *F.P.C.*, 201 F. 2d 183, 186-187 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 934 (1953). As the District of Columbia Circuit there held:

> "* * * [T]he objection—if any—to the taking of official notice by the Examiner was waived by

[18] June 11, 1946, c. 324 § 7, 60 Stat. 241, 5 U.S.C. § 1006(d).

> failure to file appropriate exception under the Commission's rules [citing § 1.31(c)]; the Company thereafter could not complain if the Commission likewise took official notice. * * *"

Furthermore, Petitioner is plainly wrong in claiming that "the showing of economic feasibility is clearly not supported by 'substantial evidence' " Pet., p. 20 (Emphasis in original). All of the economic studies, upon which the Commission made findings, were based upon the $4,258,000 of investment, even though a portion of that investment was authorized in another docket. On the basis of this evidence the Commission, without contradiction, found that the proposed arrangement yielded a 12.64% rate of return on an incremental basis and that such incremental return would redound to the benefit of all of Transco's jurisdictional customers.

D. Petitioner's Contention That the Evidence of Record Does Not Substantiate the Commission's Findings of Present or Future Public Convenience and Necessity Is Without Merit

Petitioner argues that the Commission should have reached contrary conclusions on the merits of the transportation service (Pet., pp. 21-24).

It is well settled, of course, that it is not the function of a reviewing court to consider *de novo* the record before the administrative agency and make new findings or substitute its evaluation of the record for the Commission's determinations. The agency in this case has applied statutory standards to a particular situation. In this case, therefore, the Court's responsibility is properly limited to reviewing whether the Commission's determination has "warrant in the record" and a reasonable basis in law. *Atlantic Refining Co.* v. *Federal Trade Commission,* 381 U.S. 357 (1965); *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111 (1944).

These same "public interest contentions" were exhaustively argued in briefs to the Examiner, on exceptions to the Examiner's Decision, on oral argument before the Commission[19] and in briefs and argument to the court below. It is respectfully submitted that these issues have been exhaustively considered by the forums which have heretofore passed upon them. The contentions do not warrant further review by this Court and certainly do not fall into any category acceptable as a basis for the grant of certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[19] As observed by the court below, 371 F. 2d 1, at p. 6:

"The decision of the Commission and its opinion on the petition for rehearing clearly indicate that careful consideration was given to all of the factors bearing on the public interest."